Shifting Between Public and Private: The Reconfiguration of Global Environmental Regulation

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ABSTRACT

Over the past two centuries, public environmental regulation (PER) has been progressively supplemented by private transnational regulation (PTR), creating a hybrid environmental governance regime. A five-category typology is developed to describe the ways in which international and national PER interact with private forms of environmental regulation. We then analyze the policy considerations that are relevant to the design of such hybrid regimes and various forms of interaction. Next, we describe two case studies that demonstrate the diversity of interactions between PER and PTR in a single regime. The case of sustainability reporting illustrates how public law builds on the expertise developed by private organizations as gradually more reporting obligations are incorporated into public law. The case of sustainable forest management regulation is somewhat more mixed, reflecting a tendency for increased state intervention, which led to partial suppression of PTR.

INTRODUCTION

Over the past two centuries, global environmental governance has been a field in continuous shift.[1] Private transnational schemes have

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1. *See, e.g.*, Neil Gunningham, *Environment Law, Regulation and Governance: Shifting Architectures*, 21 J. ENVTL. L. 179 (2009).

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taken an increasingly important role in the regulation of environmental dilemmas, operating alongside the conventional regulatory instruments (national legislation and treaty-based regimes). These private transnational instruments have been promoted through private transnational organizations, alongside public international bodies and national governments.[2] The authority gained by private transnational regulation (PTR) has not been exclusive to environmental governance,[3] although environmental instruments have played a leading role in transforming PTR into a prominent form of global governance.[4] PTR can be found in diverse areas ranging from trade-related issues, such as financial reporting, corporate governance, product standards, and copyright,[5] to core sustainability issues focusing on corporate

2. *See* Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of The State*, *in* THE POLITICS OF GLOBAL REGULATION 44, 45 (Walter Mattli & Ngaire Woods eds., 2009); TIM BÜTHE & WALTER MATTLI, NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY 1 (2011); Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 AM. J. SOC. 297, 299 (2007); Ronit Karsten & Volker Schneider, *Global Governance through Private Organizations*, 12 GOVERNANCE 243, 255 (1999); Oren Perez, *Private Environmental Governance as Ensemble Regulation: A Critical Exploration of Sustainability Indexes and the New Ensemble Politics*, 12 THEORETICAL INQUIRIES L. 543, 548 (2011) [hereinafter Perez, 2011]; Andreas Georg Scherer et al., *Global Rules and Private Actors: Towards a New Role of the Transnational Corporation in Global Governance*, 16 BUS. ETHICS Q. 505, 513 (2006).

3. *See* Rodney Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in the International System*, *in* 85 THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 3 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002). *See also* NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM, (Richard Higgott et al. eds., 2004) (analyzing evolving state roles in the international context and their interrelationship with non-state actors); CHRISTER JÖNSSON & JONAS TALLBERG, TRANSNATIONAL ACTORS IN GLOBAL GOVERNANCE: PATTERNS, EXPLANATIONS, AND IMPLICATIONS (2010) (detailing how transnational actors, like NGOs and multinational companies, are taking on more complex forms of governance); PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (A. Claire Cutler et al. eds., 1999) (examining how private actors are taking over some public roles in the international arena).

4. *See* Walter Mattli & Ngaire Woods, *In Whose Benefit? Explaining Regulatory Change in Global Politics*, *in* THE POLITICS OF GLOBAL REGULATION 1 (2009); David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 261, 271 (2008). *See generally* BENJAMIN CASHORE ET AL., GOVERNING THROUGH MARKETS: FOREST CERTIFICATION AND THE EMERGENCE OF NON-STATE AUTHORITY (2004) (speaking to the importance of grounding any theory of private governance with well-researched and exhaustive empirical accounts).

5. *See* Thomas Hale & David Held, *Introduction: Mapping Changes in Transnational Governance*, *in* HANDBOOK OF TRANSNATIONAL GOVERNANCE: INSTITUTIONS & INNOVATIONS 1 (Thomas Hale & David Held eds., 2011).

responsibility and sustainability, human and labor rights, and environmental protection.[6]

The field of environmental governance has transformed into a hybrid system that includes both binding treaty instruments, such as the United Nations Climate Change Convention (1992) or the Convention on Biological Diversity (1992), and private instruments, such as voluntary corporate codes, environmental management systems, green labels, and indexes and environmental reporting standards. The result has been described as regime complexity or ensemble regulation: a proliferation of regulatory schemes operating in the same policy domain and supported by varied combinations of public and private actors, including states, international organizations, businesses, and NGOs.[7]

PTR research focuses on several core questions relating to the institutional structure of private regulatory bodies: the ways in which they gain authority and their institutional motivations; their impact on private entities (given their voluntary nature); and the effects of the rise of PTR on public regulation.[8] Within the later context, we aim in this paper to study PTR by analyzing the forms and consequences of interaction between public and private regulation. Studying the interactions that define and delineate the boundaries and overlaps between private and public environmental law public, law is a necessary step in developing a better understanding of the new hybrid system of global environmental governance.

In Section B, we develop a typology describing the ways in which global and national environmental public regulation interact with private forms of environmental regulation. In Section C, we analyze the policy considerations relevant to the design of such hybrid regimes. We use this theoretical framework to analyze two case studies that demonstrate both the growth of PTR and its extensive interactions with public law. The first case study, analyzed in Section D, focuses on sustainability reporting, a field that has grown significantly over the past ten years and is governed by an intricate web of private and public regulatory schemes. The second case study, discussed in Section E,

6. *See* Peter Grabosky, *Beyond Responsive Regulation: The Expanding Role of Non-State Actors in the Regulatory Process*, 7 REG. & GOVERNANCE 114, 116–19 (2013); Daphne Barak-Erez & Oren Perez, Whose Administrative Law is it Anyway? How Global Norms Reshape the Administrative State 46 CORNELL INT'L L.J. 455 (2013).

7. *See* Kenneth W. Abbott, Jessica F. Green & Robert O. Keohane, *Organizational Ecology and Institutional Change in Global Governance*, 70 INT'L ORG. 1 (2015); Burkard Eberlein et al., *Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*, 8 REG. & GOVERNANCE 1 (2013); Perez, 2011, *supra* note 2.

8. *See* Tim Büthe, *Private Regulation in the Global Economy: A (P)Review*, 12 BUS. & POL. 1, 3 (2010).

considers the field of sustainable forest management and the role played by private transnational certification alongside more traditional public law approaches in its governance. In Section F, we conclude with some observations on the policy issues involving the potential synergy between private and public regulation at the global sphere.

I. A TYPOLOGY OF PUBLIC-PRIVATE INTERACTIONS

The spheres of global public and private regulation, together with national regulation, interact in various ways to form a hybrid international governance regime.[9] Past research distinguishes between two polar forms of interaction between public and private regimes: public law can either restrict or enhance the authority of non-state (private) rulemaking and certification organizations.[10] This distinction, however, is too simplistic in its portrayal of the complex interactions between public and private forms of environmental regulation. To more closely capture the various intricacies of public-private interactions, we developed a more nuanced approach that is based on a typology of five different types of interaction: incorporation, facilitation, abstention, substitution, and suppression (Table I). Although this typology is more subtle than the binary distinction between restriction and enhancement, it is expected that public-private interactions may, in reality, also take an intermediate form that lie in between some of these ideal types. A particular system of environmental governance may also include several types of interactions, creating a complex hybrid structure. In Sections D and F, we apply this typology in the study of two of global regimes: the regulation of sustainability reporting and the global regime for sustainable forest management.

Because public law has preceded private regulation and is supported by the enforcement power of the state, our typology describes the interactions from the vantage point of public law. In other words, it considers the degree to which public law supports or opposes the adoption of private law standards, and the legal mechanisms used in

9. Abbott & Snidal, *supra* note 2, at 44, have distinguished between five stages of the regulatory process: agenda-setting, negotiation of standards, implementation, monitoring, and enforcement. The chapter focuses on the manifestation, or implementation stage of regulation. It does not go into the details of the institutional processes that bring about certain forms of implementation and interaction.

10. *See* CASHORE ET AL., *supra* note 4, at 21; Lars H. Gulbrandsen, *Dynamic Governance Interactions: Evolutionary Effects of State Responses to Non-State Certification Programs*, 8 REG. & GOVERNANCE 74, 76 (2014); *see also* David M. Trubek & Louise G. Trubek, *New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUROPEAN L. 539 (2007) (arguing that private-public regulation can coexist in a state of rivalry, complementarity, or hybridity).

support of these ends. Other viewpoints are also possible by focusing, for example, on the question of whether private law standards adopt or exceed public law requirements.[11]

Incorporation refers to situations where public law adopts requirements that actively support the use of private standards. Where incorporation involves the adoption of stricter rules than those previously existing, it may serve as a catalyst for improvement in public standards of environmental protection, health and safety, and transparency. Also, if private standards enjoyed high legitimacy before incorporation, then the incorporation process may further strengthen the legitimacy of public regulation and its perceived epistemic foundation. Nevertheless, incorporation may also have negative implications. In particular it may be seen as a form of capture of public regulation by private interests.

An example of incorporation is the 2007 Swedish "Guidelines for External Reporting of State-Owned Companies." These guidelines require Swedish state-owned enterprises to publish sustainability reports (SR)[12] according to the Global Reporting Initiative (GRI) private transnational reporting guidelines.[13] The Swedish guidelines positively

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11. Bartley has analyzed the interactions between private and public law from the viewpoint of PTR regimes. Within this context, he identifies three forms of interactions: (1) Private standards that require compliance with national law but otherwise remain silent on the particular practices; (2) Private standards that require particular practices but in some cases are substantively different than those in national law and amount to "beyond compliance"; (3) Private standards that required practices substantively similar to those in national law, with legal compliance and private compliance being de facto equivalents. *See, e.g.*, Tim Bartley, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, 12 THEORETICAL INQUIRIES L. 517 (2011).

12. The Swedish Guidelines for External Reporting by State-Owned Companies (OCH REGERINGSKANSLIET, REGERINGEN, GUIDELINES FOR EXTERNAL REPORTING BY STATE-OWNED COMPANIES) complement the accounting legislation and generally accepted accounting principles. The Guidelines state that "The boards of the state-owned companies are responsible for the companies presenting sustainability reports in accordance with the Global Reporting Initiative (GRI)'s guidelines which, together with other financial reports, make up an integrated basis for assessment and follow-up." *See generally Och Regeringskansliet, Regeringen, Guidelines for External Reporting by State-Owned Companies* [*The Swedish Guidelines for External Reporting by State-Owned Companies*] (2007) [hereinafter *Swedish External Reporting Guidelines*], http://www.regeringen.se/contentassets/601a30d9e8d941d8b7d9e94b484bdac6/guidelines-for-external-reporting-by-state-owned-companies.

13. The GRI Guidelines offer "Reporting principles, Standard Disclosures and an Implementation Manual for the preparation of [SR] by organizations, regardless of their size, sector or location." *See* GLOBAL REPORTING INITIATIVE, *GRI G4 Guidelines and ISO 26000:2010 How to use the GRI G4 Guidelines and ISO 26000 in conjunction* (2014), http://www.iso.org/iso/iso-gri-26000_2014-01-28.pdf [hereinafter GRI, GRI G4 GUIDELINES AND ISO 26000:2010]. The GRI has evolved into the leading transnational SR code. *See, e.g.*, David L. Levy & Halina Szejnwald Brown, *The Global Reporting Initiative: Promise*

impacted the quality of reports by those companies reporting mandatorily compared to those reporting voluntarily.[14] Another example is the mandatory incorporation of guidelines by Hazard Analysis Critical Control Point (HACCP), a private food safety system, into countries' public law systems. The HACCP, formerly fully private guidelines, have been incorporated into public food regulation in several developed countries.[15]

Second, *facilitation* refers to situations where public law provides enabling conditions for private regulation to be adopted by private firms but does not require its implementation. This can occur through mandating in law environmental processes, outputs, or outcomes without prescribing the exact details of these activities. Corporations are then left either to devise a system of their own or to adopt existing private standards. In such cases, the option of adopting private standards may be more attractive to firms because it would be cost-effective and offer other advantages (e.g., legitimacy) than the option of self-development. One example of such interaction is the Directive 2014/95/EU regarding the disclosure of non-financial and diversity information by certain large undertakings and groups.[16] The directive requires large firms (with an average number of 500 employees) to publish a non-financial statement containing information on the impact of the firm's activity on environmental, social and employee matters, human rights, anti-corruption and bribery issues. Because the directive has not specified the ways in which firms should actually satisfy their

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and Limitations, *in* BUSINESS REGULATION AND NON-STATE ACTORS: WHOSE STANDARDS? WHOSE DEVELOPMENT? 109–10 (Darryl Reed, Peter Utting & Ananya Mukherjee Reed eds., 2014); Halina Szejnwald Brown, Martin de Jong & David L. Levy, *Building Institutions Based on Information Disclosure: Lessons from GRI's Sustainability Reporting*, 17 J. CLEANER PRODUCTION 571, 571 (2009); Dror Etzion & Fabrizio Ferraro, *The Role of Analogy in the Instutionalization of Sustainability Reporting,* 21 ORGAN. SCI. 1092, 1092 (2010).

14. *See* Patrycja Hąbek & Radosław Wolniak, *Assessing the Quality of Corporate Social Responsibility Reports: The Case of Reporting Practices in Selected European Union Member States*, 50 QUALITY & QUANTITY 399, 401–06 (2016).

15. Hobbs discusses the adoption of HACCP as mandatory standards in the United States. The study presents empirical research that has measured the impact of the adoption of HACCP standards on international trade. Findings indicate that mandatory adoption of HACCP has positively affected exporters to the United States from developed countries while negatively impacting exports from developing countries. In this case, the adoption of HACCP as mandatory served as a barrier (at least for the short term), rather than a catalyst for improvement in food manufacturing standards of developing countries. A different study, however, found that large exporters, whether from developed or developing countries were positively affected by the mandatory food standards. *See* Jill E. Hobbs, *Public and Private Standards for Food Safety and Quality: International Trade Implications*, 11 ESTEY CTR. J. INT'L L. & TRADE POL'Y 136, 147 (2010).

16. *See* Council Directive 2014/95/EU, art. 50, 2014 O.J. (L 330) 1.

disclosure obligations,[17] it facilitates reference to private reporting standards such as GRI Guidelines, which can provide the needed specifications.[18] Another example of facilitation is when corporate law is revised to resolve potential conflicts between the fiduciary duties of corporate managers and their Corporate Social Responsibility (CSR) commitments.[19] Such revision took place in 2006 with the adoption of the new British Companies Act.[20] Section 172 of the revised Act includes a broad formulation of directors' fiduciary duties, which recognizes that in fulfilling their duty to promote the success of the company, directors should take into account "the impact of the company's operations on the community and the environment."[21] The legal permission given to managers to consider issues beyond the financial bottom line allows corporations to join CSR schemes that may include obligations going beyond those included in public law. Examples include the UN Global Compact,[22] the Principles of Responsible Investment,[23] and the Carbon Disclosure Project (CDP).[24]

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17. *See* European Commission, Consultation Document: Non-Binding Guidelines for Reporting of Non-Financial Information by Companies (2016), http://ec.europa.eu/finance/consultations/2016/non-financial-reporting-guidelines/docs/consultation-document_en.pdf [hereinafter European Commission, Consultation Document].

18. *See* GLOBAL REPORTING INITIATIVE, *GRI G4 Sustainability Reporting Guidelines—Reporting Principles and Standard Disclosure,* https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf [hereinafter GRI G4].

19. When there is uncertainty regarding the contribution of CSR commitments to the firm's profits, the managers' commitment to CSR can be seen as a breach of their fiduciary duties. *See, e.g.*, Alissa Mickels, Note, *Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe*, 31 HASTINGS INT'L & COMP. L. REV. 271 (2009).

20. *See* Timothy M. Devinney et al., *Corporate Social Responsibility and Corporate Governance: Comparative Perspectives*, 21 CORP. GOVERNANCE 413, 414 (2013).

21. Companies Act 2006, c. 46, pt. 10, § 172 (UK).

22. The UN Global Compact is a Declaration comprising ten principals developed and advanced by the UN initiative Global Compact: *See The Ten Principles of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, https://www.unglobalcompact.org /what-is-gc/mission/principles (last visited Apr. 3, 2018). The UN Global Compact is considered to be the world's largest voluntary corporate responsibility initiative. *See* Andreas Rasche, Sandra Waddock & Malcolm McIntosh, *The United Nations Global Compact: Retrospect and Prospect*, 52(1) BUS. SOC. 6 (2012).

23. The Principles for Responsible Investment (PRI) is an initiative as well as a set of guidelines for investors and financial institutions who want to consider environmental, social, and governance issues as part of their investment process. *See* Annett Baumast, *Principles for Responsible Investment*, *in* ENCYCLOPEDIA OF CORPORATE SOCIAL RESPONSIBILITY 1898 (Samuel O. Idowu ed., 2013).

24. *See generally* THE CARBON DISCLOSURE PROJECT, https://www.cdp.net/ (describing the Project's mission to hold corporations accountable for environmental awareness) (last visited Apr. 3, 2018).

Abstention occurs when public law is silent about issues covered by private regulation.[25] One can view such silence as a form of weak facilitation since adoption of private regulation is neither encouraged nor discouraged. In most cases, abstention enables growth and innovation of private regulation, creating space for market initiatives where the state is inactive or international agreements do not apply. In fewer cases, abstention may weaken PTR, especially when there is a weak market demand for private standards, which is unsupported by governmental incentive. An example is the lack of intervention of EU law until 2007 in the market of organic products. This enabled the flourishing of private organic labeling standards until the introduction of public regulation in 2007.[26]

Substitution, also referred to as publicization, refers to situations where public law takes over the regulation of issues that were previously governed by private law. This may occur because of shifts in government policy priorities, which drive new public intervention. Substitution may also be driven by public concerns over the legitimacy, credibility, integrity, and effectiveness of private arrangements.[27] In both cases substitution would cause a gradual withdrawal of private regulation, giving way to public regulation. A good example of substitution occurred in the case of the EU regime on the production and labeling of organic products. By 2007, the EU regulatory regime had taken over most of the powers of the PTR that flourished in Europe before 2007.[28]

Finally, *suppression* takes place when public law prohibits certain forms of private regulation and directly intervenes in the private sphere to stop or curtail them. Such intervention is likely to occur when the credibility and legitimacy of private regulatory schemes are questioned (and are seen as directly opposing the values of public law) or when

25. It has been disputed whether such regulatory voids exist in the context of private standards. *See* Bartley, *supra* note 11, at 518–19 (claiming that in most cases private standards do not add new rules for previously ungoverned phenomena; rather, they add an additional layer of rules for phenomena that are already regulated by public law).

26. *See* Alessandra Arcuri, *The Transformation of Organic Regulation: The Ambiguous Effects of Publicization*, 9 REG. GOV. 144, 148 (2015) (Neth.).

27. *See* Shana Starobin & Erika Weinthal, *The Search for Credible Information in Social and Environmental Global Governance: The Kosher Label*, 12 BUS. POL. 1, 1–2 (2010), for an analysis of the credibility paradox of private third-party certification schemes.

28. *See* Arcuri, *supra* note 26, at 2–3; *see also* Council Regulation 834/2007 on Organic Production and Labelling of Organic Products and Repealing Council Regulation 2092/91/EEC, 2007 O.J. (L 189) 1, 1–3. *See generally* EUROPEAN COMMISSION, *Agriculture and Rural Development*, https://ec.europa.eu/agriculture/organic/index_en (discussing the latest changes by EU regulations to agriculture and rural development in Europe) (last visited Apr. 3, 2018).

private regulation is seen as completely ineffective. Suppression may be followed by substitution where public law competes with private regulatory schemes and aims to replace them. Yet, following suppression, public law may choose to abstain from further intervention, focusing on disallowing the continuation of the private scheme. An example of potential suppression is the EU Council Regulation on the Protection of Animals at the Time of Killing,[29] which has permitted religious slaughter methods with no stunning to continue. The regulation, however, also allowed Member States to impose stricter rules if they wish, including abolishing the exemption of certain religious slaughter from pre-stunning regulation practices.[30] In mid-2017, Wallonia and Flanders regions in Belgium were the first in the EU to approve regulations banning the slaughtering of animals without prior anesthesia or stunning. These regulations were heavily debated because of their suppressing effect against religious methods of Kosher and Halal slaughter. [31]

29. *See* Council Regulation 1099/2009 of Sept. 24, 2009, On the Protection of Animals at the Time of Killing. This regulation entered into force on January 1, 2013 and replaced Council Directive 93/119/EC.

30. *See* Christopher Needham, *Religious Slaughter of Animals in the EU, Library Briefing* (Libr. of the Eur. Parliament), Nov. 15, 2012, http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2012/120375/LDM_BRI(2012)120375_REV2_EN.pdf; *see also* Caroline Wyatt, *Should Religious Slaughter be Banned in the UK?,* BBC NEWS UK, (Feb. 15, 2015), http://www.bbc.co.uk/news/uk-31411219 (for the debate).

31. *See generally* Dafydd ab Iago, *To Stun or Not to Stun*, THE BRUSSELS TIMES (Belg.), (June 7, 2017), http://www.brusselstimes.com/opinion/8425/to-stun-or-not-to-stun (describing religious methods of Kosher and Halal slaughter and the effect on the greater community).

Table I: Typology of Public-Private Interactions in Environmental Governance

Type	Description	Example
Incorporation	Public law adopts requirements that actively support the use of private standards	2007 Swedish Guidelines for External Reporting of State Owned Companies, which require that reports follow the GRI standard
Facilitation	Public law creates conditions that enable private regulation to be adopted by private firms, but does not require its implementation	EU Directive 2014/95, which requires large firms to report on sustainability issues, but without providing detailed creating reporting guidelines Section 172 of the British Companies Act, which allows company directors to take into account the impact of the company's operations on the community and the environment, without referring to specific standards
Abstention	Public law is silent about issues covered by private regulation	EU regime on the production and labeling of organic products before 2007
Substitution	Public law takes over the regulation of issues that were previously regulated by private instruments	EU regime on the production and labeling of organic products after 2007 2012 Grenelle Act in France, which requires the inclusion of social and environmental information in firm's annual reports
Suppression	Public law directly intervenes in the private realm to stop certain forms of private regulation	Council Regulation 1099/2009 on the protection of animals at the time of killing, which allows the state to intervene in certain private religious practices

II. THE OPTIMAL DISTRIBUTION OF AUTHORITY BETWEEN PUBLIC AND PRIVATE REGULATION

From a policy perspective, the question is which of the foregoing forms of public-private interactions best serve the public interest. In other words, what is the optimal distribution of authority between the public and private realms? We will not attempt to offer a complete answer to this question. But, we attempt to outline the general considerations that should guide policy makers in the design of hybrid regulatory regimes, as well as note the advantages and disadvantages of private regulation in comparison to those of public regulation. In the next section, we examine the mechanisms that can mitigate some of the weaknesses of private regulation. We focus on these mechanisms not because we think public regulation is beyond reproach but because less writing has been dedicated to these type of mechanisms.

A. Private Regulation: Strengths and Weaknesses

In thinking about the design of a hybrid regulatory regime there are some generic advantages of private instruments, which need to be emphasized. The first advantage concerns the distribution of *information*: in some contexts, private parties have better knowledge of the regulatory field or have better capacity to develop the needed information than public actors. Private parties involved in PTR may have more of the expertise and knowledge that are required to cope with highly technical problems and to have access to the latest innovations in fields affected by high rates of technological change.[32] In the area of sustainability reporting, for example, GRI has almost a decade of experience in dealing with the challenges involved in non-financial reporting. It seems reasonable that, in developing guidelines on methodology for reporting non-financial information, the EU would turn to GRI.[33]

Second, private regulation is also more *flexible* and has better adaptive capacities than public regulation due to its closer association with business actors, which makes it more attuned to business needs and practices and to market changes. Private regulation is better suited

32. *See* David L. Weimer, *The Puzzle of Private Rulemaking: Expertise, Flexibility, and Blame Avoidance in US Regulation*, 66 PUB. ADMIN. REV. 569, 569 (2006).

33. This issue has been the subject of consultation, which ended on April 15, 2016. *See* Directorate-General for Financial Stability, Financial Services and Capital Markets Union, Consultation Document Non-Binding Guidelines For Reporting of Non-Financial Information by Companies (EC), at 1, SEC (2016), http://ec.europa.eu/finance/consultations/2016/non-financial-reporting-guidelines/index_en.htm.

to the challenges posed by fast-changing environments when regulated entities are heterogeneous and regulatory outputs are relatively difficult to monitor.[34] Organizations such as PEFC working in the sustainable forest management (SFM) and certification field (as further described in Section E) have gained broad support because of their context sensitivity and ability to adapt and change in response to market signals.[35] Also, unlike public regulation, which enjoys a monopoly status, private schemes must deal with competition from rival initiatives. This competitive environment is likely to contribute to the responsiveness of private schemes.[36]

Another advantage of private regulation concerns its capacity to create transnational regimes. Building public treaty-regimes has proven cumbersome, slow, and often ineffective, especially when distributional conflicts are involved.[37] Agreeing, for instance, on acceptable levels of carbon emissions has often taken the better part of two decades—and it is still not certain whether the Paris Agreement would be able to deliver the necessary regulatory outcomes.[38] PTR offers an alternative regulatory route that bypasses the transaction costs associated with the standard form of developing international public law. An example is the use of private standards that govern the measurement and management of greenhouse gases (GHG), such as the Verified Carbon Standard (VCS) and the Gold Standard (GS). These standards complement the compliance regime of the UNFCCC and Paris Agreement and create agreed upon standards without having to undergo the trying process of acceptance under the UNFCCC process.[39]

Similarly, at the national level, the use of private regulatory instruments can *reduce public expenditure* on norm setting, implementation monitoring, and enforcement.[40] The costs of creating

34. *See* Cary Coglianese & David Lazer, *Management- Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. SOC. REV. 691, 705 (2003).

35. *See* CASHORE ET AL., *supra* note 4, at 219.

36. *See* Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 EUR. J. INT'L L. 47, 78 (2006) (assessing private forest certification schemes as more flexible and adaptive than public regulation).

37. *See* Büthe, *supra* note 8, at 5.

38. *See* WOLFGANG OBERGASSEL ET AL., PHOENIX FROM THE ASHES: AN ANALYSIS OF THE PARIS AGREEMENT TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, WUPPERTAL INSTITUTE FOR CLIMATE, ENVIRONMENT AND ENERGY (2016), https://epub.wupperinst.org/frontdoor/deliver/index/docId/6374/file/6374_Obergassel.pdf; Clive L. Spash, *This Changes Nothing: The Paris Agreement to Ignore Reality*, GLOBALIZATIONS 928, 928 (2016).

39. *See* Jessica F. Green, *Order out of Chaos: Public and Private Rules for Managing Carbon*, 13 GLOB. ENVTL. POL. 1, 1–2 (May 2013).

40. *See* Natalie Stoeckl, *The Private Costs and Benefits of Environmental Self- Regulation: Which Firms Have Most to Gain?*, 13 BUS. STRATEGY ENV'T 135, 136

and managing PTR are born by private bodies (i.e., civic society and business) with no or little public involvement. The costs of public regulation, on the other hand, fall on the taxpayer. While public authorities may still be required to supervise private enforcement through meta-regulation,[41] the costs of such indirect regulatory effort are likely to be less than the costs of full regulatory intervention. A good example of such delegation of public authority is the EU biofuel regime which will be described in more detail below.[42]

Finally, private regulatory schemes can reinvigorate democratic practices by employing sophisticated forms of public consultation, which are not tied to conventional practices of administrative law.[43] This advantage can be particularly pertinent at the global level where private regimes can utilize novel forms of civic participation that go beyond the two-level democratic schemes of public international law. In this context, private standards can also empower and give voice to local communities in cases where the adverse effects of certain regulation are mostly felt at particular geographic locations (e.g., biofuels).[44]

But shifting regulatory powers (both norm-making and compliance) to private bodies, whether implicitly, by not acting publicly, or explicitly, through facilitation or incorporation, also generates various regulatory challenges. The first problem concerns the risk of *regulatory capture*. This risk is relevant both to the norm-making phase and to the

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(2004) (stating that "self-regulation can be considerably less costly [to taxpayers] than government-imposed regulations"); *see also* Joseph Rees & Neil Gunningham, *Industry Self-Regulation: An Institutional Perspective,* 19 L. POL'Y 363, 363 (1997) ("[T]here is growing evidence of a range of circumstances where self-regulation [either alone, or more commonly, in conduction with other policy instruments] can be a remarkably effective and efficient means of social control.").

41. *See* Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility*, *in* THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 207, 208 (Doreen McBarnet et al. eds., 2007).

42. *See* Jolene Lin, *Governing Biofuels: A Principal-Agent Analysis of the European Union Biofuels Certification Regime and the Clean Development Mechanism*, 24 J. ENVTL. L, 43, 43–44 (2012); Phillip Paiement, *Transnational Delegation, Accountability and the Administrative Governance of Biofuel Standards* (Transnat'l Bus. Governance Interactions, Research, Working Paper No. 16, 2017).

43. *See* Oren Perez, *Open Government, Technological Innovation and the Politics of Democratic Disillusionment: (E-)Democracy from Socrates to Obama*, 9 I/S: J.L. & POL'Y FOR INFO. SOC'Y 61, 61–62, 69 (2013).

44. *See* Paiement, *supra* note 42, at 25–26; *see also* Graeme Auld et al., *Transnational Private Governance Between the Logics of Empowerment and Control*, 9 REG. GOVERNANCE 108, 108–110 (2015); Jennifer Franco et al, *Assumptions in the European Union Biofuels Policy: Frictions with Experiences in Germany, Brazil and Mozambique*, 37 J. PEASANT STUD., 661, 661, 665 (2010); Marc Schut & Madeleine J. Florin, *The Policy and Practice of Sustainable Biofuels: Between Global Frameworks and Local Heterogeneity. The Case of Food Security in Mozambique*, 72 BIOMASS BIOENERGY 123, 124 (2014).

implementation and enforcement phases. Regulatory capture can take various forms. First, through their institutional links with PTR bodies (e.g., Responsible Care), firms can influence both the content of the norms and the enforcement strategies of private schemes. The proximity of private regulation to the business sector is seen as a source of regulatory risk. Some authors see the process of shifting authority to the private realm as part of a deregulatory agenda that seeks to undermine the transformative power of public environmental regulation.[45] Other authors have argued that the risk of capture is greater with private regulation because private norm-making processes do not provide civic organizations with the same kind of voice they receive under public law.[46]

A second challenge relates to concerns about the *organizational and enforcement capacity* of private regulatory bodies. Compliance assurance mechanisms in PTR regimes suffer from various weaknesses compared with public regulatory regimes simply because they do not have the power of the state at their disposal.[47] This challenge can motivate firms to use private schemes strategically to preempt more stringent public regulation.[48] Yet, as we will discuss in the next subsection, private regulatory bodies may draw upon public regulation to supplement the capacities they lack, specifically in enforcement.

The final challenge concerns the tension between privatization of regulatory authority and democratic values. While we pointed out above that private regulation has certain democratic advantages, it also suffers from some potential drawbacks. These reflect the fact that private regulation does not come with all the democratic assurances of state-centric models of democratic accountability. For this reason, regulators and civic society may question the *legitimacy* of PTR. Thus, for example, while some private bodies like the GRI have developed

45. Robert Falkner, Private Environmental Governance and International Relations: Exploring the Links, 3(2) GLOBAL ENVTL. POL. 72, 81 (2003).

46. TIMOTHY WERNER, PUBLIC FORCES AND THE PRIVATE POLITICS OF AMERICAN BIG BUSINESS (2012).

47. FIONA HAINES, GLOBALIZATION AND REGULATORY CHARACTER 133 (Aldershot-Ashgate, 2005); Colin Scott, *Non-Judicial Enforcement of Transnational Private Regulation*, *in* ENFORCEMENT IN TRANSNATIONAL REGULATION – ENSURING COMPLIANCE IN A GLOBAL WORLD 147, 152 (Fabrizio Cafaggi ed., Cheltenham, UK Edward Elgar, 2012).

48. Andrew A. King & Michael J. Lenox, *Industry Self-Regulation Without Sanctions: The Chemical Industry's Responsible Care Program*, 43 ACAD. MANAG. J. 698 (2000); Oren Perez, *The Green Economy Paradox: A Critical Inquiry into Sustainability Indexes*, MINN. J.L. SCI. & TECH. 153 (2016) [hereinafter Perez, *The Green Economy Paradox*]; Martina Vidovic, Neha Khanna & Michael S. Delgado, Third Party Certification and the Effectiveness of Voluntary Pollution Abatement Programs: Evidence from Responsible Care, AGRICULTURAL & APPLIED ECONOMICS ASSOCIATION 2013 ANNUAL MEETING (2013).

complex participatory structures that provide civic society a significant voice in the development of standards and the management of the regime,[49] other schemes, such as FTSE4Good[50] and the Dow Jones Sustainability Index (DJSI),[51] provide little opportunity for civic participation and are controlled by business entities.[52]

B. Mitigating Weaknesses of Private Regulation

The literature has identified several potential responses to the limitations of using private regulation. A central strategy is regulatory "enrollment." Enrollment occurs when a public regulator chooses to engage with private actors that possess resources relevant for regulation, such as information, expertise, financial means, or organizational capacity.[53] Private regulators may wish to enroll public regulators to gain enforcement authority and to secure compliance, while public regulators may involve private actors for informational or resource gains to more efficiently utilize their monitoring and enforcement resources.[54] Under our typology, enrollment can take the form of incorporation of facilitation. Such is the case with public food

49. *See* Meidinger, *supra* note 36, at 82 (finding that private certification schemes in the forest sector are increasingly transparent and participatory compared to government programs).

50. FTSE4Good investment indices were launched in the UK during July 2001. These indices represent subsets of the well-established "FTSE" share trading indices with inclusion in the listings being subject to various ethical criteria. *See* Aaron Chatterji & David Levine, *Breaking Down the Wall of Codes: Evaluating Non-Financial Performance Measurement*, 48 CAL. MGMT. REV. 29, 40 (2006). This paper compares FTSE4Good and DJSI indices on the basis of their weighting systems, bars of performance, method of data collection, transparency, and other issues. It finds that their measurement systems, the resulting selection, and ranking of companies differ considerably.

51. DJSI is one of the most prominent sustainability indices. The DJSI was launched in 1999. Over time, regional indices have also been created. The Dow Jones STOXX Sustainability Index (DJSSI) for Europe's sustainability leaders was created in 2001, the DJSI North America (DJSINA) was created in 2005, and the Dow Jones Sustainability Asia Pacific Index was created in early 2009. DJSI was established to track the performance of companies that lead the field in terms of corporate sustainability. Company performance is tracked through a corporate sustainability assessment that has an explicit objective to measure and verify the corporate sustainability performance of the companies in the investible universe. *See* Perez, *supra* note 43, at 100; Cory Searcy & Doaa Elkhawas, *Corporate Sustainability Ratings: An Investigation into How Corporations Use the Dow Jones Sustainability Index*, 35 J. CLEANER PRODUCTION 79, 79–80 (2012).

52. *See* Perez, *supra* note 48, at 204.

53. *See generally* Julia Black, *Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation*, 2003 PUB. L. 63 (explaining the process of enrollment).

54. *See* Paul Verbruggen, *Gorillas in the Closet? Public and Private Actors in the Enforcement of Transnational Private Regulation*, 7 REG. & GOVERNANCE 512, 525 (2013).

safety authorities, such as those in the Netherlands, which have incorporated private certification schemes to benefit from the information that the schemes generate about HACCP compliance by companies in the sector.

Another response is the use of *meta-regulatory techniques*, which give the public regulatory system some control over the private system.[55] In meta-regulation, regulators induce private entities to develop regulatory regimes by shifting some of the powers to the private domain.[56] However, the public regulator sets out the general goals and principles of the regime, leaving the creation of the detailed standards and compliance techniques to private parties. Monitoring by the public regulator then focuses, first, on the consistency of the private regime with the general principles and, second, on the quality of the private regulator self-assessment process (focusing, for example, on the compliance with the provisions of the private standard).[57]

The EU regime on renewable energy (Renewable Energy Directive 2009/28/EC), (henceforth "RED"),[58] takes this approach, which sets out general substantive and procedural guidelines with which the private bio-fuel schemes must comply. The RED regime represents an intermediate option between incorporation and substitution (or publicization) because it outlines general guidelines for their operation while referring to private standards. In particular, the RED regime sets out substantive and procedural sustainability criteria to determine whether biofuels can be counted as "sustainable" for the purpose of EU law.[59] In July 2010, the EU Commission announced a procedure by which voluntary schemes would be recognized as a venue for

55. *See* Bridget Hutter, *Risk, Regulation, and Management*, *in* RISK IN SOCIAL SCIENCE 202, 215 (Peter Taylor-Gooby & Jens Zinn eds., 2006) (defining meta-regulation as "the state's oversight of self-regulatory arrangements").

56. *See* Cary Coglianese & Evan Mendelson, *Meta-Regulation and Self-Regulation, reprinted in* THE OXFORD HANDBOOK ON REGULATION 1, 9 (Martin Cave, Robert Baldwin & Martin Lodge, eds., 2010).

57. For an extensive discussion on meta-regulation see Sharon Gilad, *It Runs in the Family: Meta- Regulation and its Siblings*, 4 REG. & GOV'T 485, 488 (2010). For an original definition of the construct see CHRISTINE PARKER, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY 1 (2002).

58. *See* Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, art. 41, 2009 O.J. (L 140) 16, 21 [hereinafter RED] (amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC); *See also* EU BIOFUELS PORTAL, https://ec.europa.eu/energy/en/topics/renewable-energy/biofuels (last visited Nov. 5, 2017).

59. *See* RED, *supra* note 58, at 17.

demonstrating compliance with the sustainability criteria in RED.[60] In addition to the substantive sustainability criteria, RED also conditions the reference to such private schemes by their meeting of "adequate standards of reliability, transparency and independent auditing."[61] Since 2011, the EU Commission has recognized nineteen different voluntary schemes as sufficiently equivalent to (partial) compliance with the RED's sustainability criteria.[62] As Philip Paiement has pointed out, making sure that the private schemes comply with these criteria is not a trivial task.[63]

Another approach is to develop various forms of collaborations between public and private bodies in the governance and operation of private schemes. This was the UN's approach in the case of the Global Compact[64] and that of UNEP with its sustainable finance initiative.[65] A related approach focuses on the creation of transnational network structures.[66] A sufficiently cohesive network structure can compensate for some of the weaknesses of private regulatory schemes. Consider the field of CSR and the multiple transnational codes that govern it. One of the unique features of this field is the presence of multiple links and cross-sensitivities between the distinct regimes, forming an "ensemble regulatory structure."[67] Some of these links can be attributed to the purposeful intervention of public bodies such as the UN and UNEP; others have evolved spontaneously. A unique feature of a regulatory network with ensemble structure is the positive regulatory synergies it generates. First, the cross-linkages between the different standards create a system of positive enforcement externalities, for which the compliance mechanisms of each regime also serve as enforcement

60. *See* European Commission (EU), *Communication from the Commission on Voluntary Schemes and Default Values in the EU Biofuels and Bioliquids Sustainability Scheme*, 2010 O.J. (C 160) 01, 4 (relying on Article 18(4) of the Directive which states that "[t]he Commission may decide that voluntary national or international schemes setting standards for the production of biomass products contain accurate data for the purposes of Article 17(2) or demonstrate that consignments of biofuel comply with the sustainability criteria set out in Article 17(3) to (5)"); RED, *supra* note 58, at 21.

61. RED, *supra*, note 58, at 25.

62. *See* PAIEMENT, *supra* note 42, at 136.

63. *See id.*

64. *See* John G. Ruggie, *The Global Compact: An Extraordinary Journey*, *in* RAISING THE BAR: CREATING VALUE WITH THE UN GLOBAL COMPACT 15, 15–16 (Claude Fussler et al. eds., 2004).

65. *See* UNEP FINANCE INITIATIVE, http://www.unepfi.org/ ("UNEP FI is a global partnership between UNEP and the financial sector.") (last visited Apr. 4, 2018).

66. *See, e.g.*, Ruggie, *supra* note 64, at 16 ("Organizationally, the Global Compact consists entirely of a set of nested networks.").

67. *See* Perez, 2011, *supra* note 2, at 548; Oren Perez, Reuven Cohen & Nir Schreiber, *Governance through Global Networks and Corporate Signaling* (forthcoming, 2018).

agents of the other regimes in the network and generate an amplified compliance effect. The consequence of this ensemble regulatory structure is that as firms subscribe to multiple CSR codes, they find it increasingly more difficult to reap the reputational gains associated with being members of CSR clubs without making real compliance efforts. After a firm starts publishing environmental reports based on the GRI guidelines (to be discussed in further detail below), adopts a certified EMS (ISO 14001 or Responsible Care), and enters the reputable list of either FTSE4Good[68] or DJSI,[69] it becomes increasingly more difficult to renege on its multidimensional commitments.[70] But the ensemble structure of this new private order has another, more subtle effect. There is a positive feedback between the multi-focal invocation of the idea of sustainability across the ensemble, the normative standing of the idea as a moral-political principle, and the moral legitimacy of the ensemble and of each of its constituent regimes.

In a recent article on "pseudo-clubs," Jessica Green highlights the advantages of the network structure of the global climate change mitigation domain.[71] "Pseudo-clubs" are described as loose private coordinative efforts to furnish standards, such as the Greenhouse Gas Protocol.[72] They laid the foundation for solving technical problems associated with the measurement of greenhouse gases.[73] The low entry costs and minimal sanctions associated with these regimes have attracted large numbers of users. With broad membership, "pseudo-clubs" can help promote the uptake of standards and potentially solve coordination problems.[74] Once they are part of the regime, firms can be enticed to adopt stricter commitments. Hence, even regimes with a very soft compliance structure may serve a useful role in the global governance game by creating the building blocks of a more formal global regime. Ultimately, private and loose measurement structures must be

68. *See FTSE4Good Index Series,* FTSE RUSSELL, www.ftse.com/products/indices/FTSE4Good (last visited Apr. 4, 2018).

69. *See* ROBECO SAM, www.sustainability-indices.com (last visited Apr. 4, 2018).

70. For an empirical study of this argument, which provides it with tentative support, see Perez et al., *supra* note 67.

71. *See* Jessica F. Green, *The Strength of Weakness: Pseudo-Clubs in the Climate Regime*, CLIMATE CHANGE 41 (2015).

72. Developed by World Resources Institute and World Business Council on Sustainable Development, this protocol now sets the global standard for how to measure, manage, and report greenhouse gas emissions.

73. "Pseudo-clubs," like the related voluntary environmental clubs, furnish non-rival public goods, often in the form of standards. However, in pseudo-clubs, membership is fluid, benefits are small and the excludability of benefits is debatable. Pseudo-clubs generally lack an enforcement requirement and hence there are little consequences for breaking the rules. *See* Perez, Cohen & Schreiber, *supra* note 67.

74. *See* Green, *supra* note 71, at 46–48.

coupled with rules to reduce emissions. These rules will be provided through governments, and private "pseudo-clubs" will eventually rely on governments to shift the cooperation from measurement only to emissions reduction.[75]

III. THE INTERACTIONS BETWEEN PRIVATE AND PUBLIC REGULATION IN SUSTAINABILITY REPORTING

A. The Global Reporting Initiative (GRI) and the Growth in Private Transnational Regulation of Sustainability Reporting

The CSR movement has changed our expectations about the modern corporation. It is now commonly accepted that corporations should deliver on the "triple bottom line," or in other words, perform sustainably.[76] Sustainability reporting (SR), which is also referred to as CSR reporting (CSRR), has been a key tool in the societal attempt to cause businesses to act responsibly and follow sustainability principles.[77] SR provides a vivid example of how PTR has structured sustainability governance, interacting with public regulation to produce a hybrid field of governance. This section will describe the way in which the field of SR has changed in the past decade, focusing on the interactions between private and public regulation.[78]

Firms, especially multinational enterprises, have been publishing non-financial information since the 1970s, usually on a voluntary basis, with no clear or common guidelines.[79] Since the beginning of the twenty-first century, there has been a significant development of PTR SR standards, most notably the Global Reporting Initiative (GRI).[80] The GRI has evolved into the leading transnational SR code,[81] with a

75. Perez, Cohen & Schreiber, *supra* note 67.

76. Jeremy Moon & David Vogel, *Corporate Social Responsibility, Government, and Civil Society*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 303 (Andrew Crane et al. eds., 2008).

77. *See generally* David L. Owen & Brendan O'Dwyer, *Corporate Social Responsibility: The Reporting and Assurance Dimension*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 384, 396 (Andrew Crane et al. eds., 2008).

78. *See id*. at 388–89.

79. *See* Nola Buhr, *Histories of and Rationales for Sustainability Reporting*, *in* SUSTAINABILITY ACCOUNTING AND ACCOUNTABILITY 57, 59–62 (Jan Bebbington et al. eds., 2007) (providing sustainability reporting history).

80. *See id*. at 59–62; Rachel Jackson, *An Introduction to Environmental and Sustainability Reporting*, *in* THE SUSTAINABLE ENTERPRISE 86, 90–91 (Christopher S. Brown ed., 2005); Rodrigo Lozano & Don Huisingh, *Inter-Linking Issues and Dimensions in Sustainability Reporting*, 19 J. CLEANER PRODUCTION 99, 100 (2011).

81. *See* Levy & Brown, *supra* note 13; Brown, Jong, & Levy *supra* note 13, at 576; Etzion & Ferraro, *supra* note 13, at 1096.

consistent growth in the number of companies choosing to report according to GRI standards.[82] International organizations involved in developing CSR goals have officially recognized GRI, granting it legitimacy and thus contributing to its prominence and credibility.[83]

B. The Interactions between GRI, National, and International Public Regulation

In recent years, SR has undergone a process in which some of the principles of sustainability reporting have been incorporated into public law, supplementing private schemes such as GRI.[84] According to a 2013 UNEP survey, over forty-five countries have since the mid-2000s adopted national policies on sustainability reporting, amounting to some 180 policies in 2013.[85] In addition, a gradual shift has also occurred in

82. The growth in the number of reporting companies has been persistent. If in 1999 only 35 percent of the largest 250 multinational companies published CSR reports, in 2013, 93 percent did so (KPMG). The GRI Guidelines dominate the global arena of sustainability reporting, having a particularly strong influence on the disclosure practices of MNEs. *See* Galit A. Sarfati, *Regulating Through Numbers: A Case Study of Corporate Sustainability Reporting*, 53 VA. J. INT'L L. 575, 580–81, 86 (2013). From data published by GRI, a consistent growth is demonstrated in the number of sustainability reports based on its guidelines, from a little over 130 in 2002 to over 1,800 reports in 2010 and over 3,100 reports in 2014 with 500 additional reports referencing the GRI. In a KPMG (2013) survey of the one-hundred largest companies in forty-one counties (the survey covered 4,100 companies in total), a majority of the companies (69 percent in 2008, 69 percent in 2011, and 78 percent in 2013) referenced the GRI standard in their sustainability reports or CSR sections in financial annual reports. *See* KPMG INTERNATIONAL, THE KPMG SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2013 31, Figure 15 (2013), https://home.kpmg.com/xx/en/home/services/advisory/risk-consulting/internal-audit-risk/sustainability-services.html (demonstrating the influence GRI reporting standards have gained in the reporting practices of large and multinational corporations in various countries).

83. *See* Jennifer Bair, *From the Politics of Development to the Challenges of Globalization*, 4 GLOBALIZATIONS 486 (2007); Levy & Brown, *supra* note 13; Perez, 2011, *supra* note 2 at 553 (discussing how the GRI guidelines are used globally in sustainability reporting).

84. *See* Sarfati, *supra* note 82, at 600 (noting the growth in national public laws and policies establishing sustainability reporting as voluntary, and more and more so, as a mandatory requirement).

85. A U.N. survey published in 2013 has documented a significant rise in the number of countries adopting mandatory and voluntary rules and policies regarding sustainability reporting between the years 2006–2013. For 2006 the survey covered nineteen countries and 60 reporting policies, 58 percent of which were mandatory, and 42 percent voluntary. For 2010, the survey covered thirty-two countries and 151 polices, of which 62 percent were mandatory. For 2013, forty-five countries and regions and 180 policies were covered, and the mandatory reporting had risen to 72 percent. This data demonstrates a general growth in the average number of policies concerning sustainability reporting from three per country in 2006 to over four per country and region in 2013. Also, the average number

public policy from voluntary to mandatory based reporting, bringing mandatory policies to 72 percent of total SR policies in existence in 2013.[86] The move towards the enrollment of public law in SR has necessarily increased the interactions with PTR SR mechanisms and certifications. However, these interactions have taken on various forms, which map into different rubrics in our typology of interactions.

Direct incorporation of the PTR standard of the GRI has occurred in the case of the 2007 Swedish "Guidelines for External Reporting of State-Owned Companies." These guidelines mandated the use of GRI in SR of state owned enterprises.[87] This form of explicit incorporation is quite rare; however, it does convey the growing acceptability and capacity of some forms of PTR such as the GRI. Such incorporation has reduced the potential for regulatory capture, since reporting demands are determined by a transnational scheme and cannot be manipulated by local interest groups.

A more typical interaction between public law and PTR is illustrated by the European Directive regarding the disclosure of non-financial and diversity information by certain large undertakings and groups.[88] The Directive, which amended prior financial reporting regulations, requires large firms (with an average number of 500 employees) to publish a non-financial statement containing information on the impact of the firm's activity on the environmental, social and employee matters, human rights, anti-corruption, and bribery issues.[89] Because the Directive did not specify the ways in which firms should actually satisfy their disclosure obligations, it works as a meta-regulator and facilitates the adoption of PTR SR standards, such as the GRI, which provide the needed specifications.[90] This facilitation lowers the

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of mandatory sustainability reporting policies rose from 1.8 in 2006 to 2.8 in 2013. UNITED NATIONS ENVIRONMENT PROGRAMME ET AL., CARROTS AND STICKS: SUSTAINABILITY REPORTING POLICIES WORLDWIDE–TODAY'S BEST PRACTICE, TOMORROW'S TRENDS 8-9 (2013), https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf.

86. *See id.*

87. The Swedish Guidelines for External Reporting by State-Owned Companies complement the accounting legislation and generally accepted accounting principles. The Guidelines state that "[t]he boards of the state-owned companies are responsible for the companies presenting sustainability reports in accordance with the Global Reporting Initiative (GRI)'s guidelines which, together with other financial reports, make up an integrated basis for assessment and follow-up." *See Swedish External Reporting Guidelines*, *supra* note 12, at 1 (translation of Guidelines).

88. *See* Council Directive 2014/95/EU, *supra* note 16.

89. *See id.* art. 1 § 1 (stating the amendment to Article 19a).

90. Although the Directive does not specify disclosure obligations, Article 2 states that "[t]he Commission shall prepare non-binding guidelines on methodology for reporting non-financial information, including non-financial key performance indicators, general and sectoral, with a view to facilitating relevant, useful and comparable disclosure of non-

cost to the regulated companies that, prior to the Directive, may have adopted certain SR standards. It also engages the expertise of private SR bodies to provide informational and resource gains to the regulator.

India's policies and regulation on SR and CSR are an example of both facilitation and a gradual move toward substitution. India's "National Voluntary Guidelines on Social Environmental and Economic Responsibilities of Business" (NVGs) were first launched in 2009.[91] These voluntary principles were revised and launched by the Ministry of Corporate Affairs in 2011.[92] The NVGs include nine general principles covering the different spheres of corporate ethics—governance and sustainability—without providing specific standards or a reporting format.[93] In 2012, the Securities and Exchange Board of India (SEBI) mandated the top one hundred listed companies report their environmental, social, and governance performance in an Annual Business Responsibility Report (BRR) to incorporate a clear reporting format.[94] The format has been based on an "Apply or Explain" methodology, whereby companies required to publish BRRs may report on non-adoption of any of the NVG's principles and are then expected to

financial information by undertakings." *Id.* art. 2. The development of such non-binding disclosure guidelines was underway in April 2016. *See* EUROPEAN COMMISSION, CONSULTATION DOCUMENT, *supra* note 17. It is too early to determine whether such guidelines will indeed facilitate or even incorporate PT SR standards or constrain them.

91. *See* MINISTRY OF CORPORATE AFFAIRS GOVERNMENT OF INDIA, CORPORATE SOCIAL RESPONSIBILITY VOLUNTARY GUIDELINES (2009), http://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf.

92. MINISTRY OF CORPORATE AFFAIRS GOVERNMENT OF INDIA, NATIONAL VOLUNTARY GUIDELINES ON SOCIAL ENVIRONMENTAL & ECONOMIC RESPONSIBILITIES OF BUSINESS 1, 3 (2011), http://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf.

93. *See id.* at 6–26.

94. The Guidelines start with the following far reaching statement: "At a time and age when enterprises are increasingly seen as critical components of the social system, they are accountable not merely to their shareholders from a revenue and profitability perspective but also to the larger society which is also its stakeholder. Hence, adoption of responsible business practices in the interest of the social set-up and the environment are as vital as their financial and operational performance. This is all the more relevant for listed entities which, considering the fact that they have accessed funds from the public, have an element of public interest involved, and are obligated to make exhaustive continuous disclosures on a regular basis." The Guidelines follow and state: "In line with the above Guidelines (NVGs) and considering the larger interest of public disclosure regarding steps taken by listed entities from an Environmental, Social and Governance ("ESG") perspective, it has been decided to mandate inclusion of Business Responsibility Reports ("BR reports") as part of the Annual Reports for listed entities." Securities Exchange Board of India, *Circular-Sub: Business Responsibility Reports* 1,1 (2012), http://www.sebi.gov.in/cms/sebi_data/attachdocs/1344915990072.pdf.

disclose the reasons for non-adoption.[95] In 2013, the mandatory nature of CSR was further strengthened by the enactment of clause 135 of the Companies Act, which required companies with a certain profit rate to spend at least two percent of their average net profit of the previous three years on CSR activities and to disclose this activity in the directors' report.[96]

A similar process has taken place in France with the adoption of the 2012 Grenelle II Act, which has widened the coverage of the previous "New Economic Regulations (NRE Act)" from 2001[97] by requiring that all medium enterprises (exceeding 500 employees) include social and environmental information in their annual reports.[98] Further, the Grenelle II Act and the associated implementation decree[99] required that the companies' annual financial reports include information on forty-two topics under the themes of social, environmental, and sustainable development. The decree addressed CSR topics, which reflect the international guidelines such as GRI. As such, the Grenelle II Act established detailed mandatory requirements for social-environmental reporting. Yet, despite its detailed structure, Grenelle II did not substitute completely the GRI scheme because it has still left undetermined some of the technical aspects of the reporting format, allowing reporting entities to turn to the GRI guidelines to fill this

95. A similar move took place in South Africa when the Johannesburg Stock Exchange required in 2010 integrated reports from listed companies. Yet in South Africa, business responsibility reports were integrated with financial reporting to produce integrated reporting. *See* Alexandra F. Clayton et al., *Integrated Reporting vs. Sustainability Reporting for Corporate Responsibility in South Africa*, 29 BULL. GEOGRAPHY SOCIO–ECON. SERIES 7, 14 (2015).

96. By this enactment, India had become the first country in the world to mandate CSR spending. *See* B. Ramesh & Savia Mendes, *Corporate Social Responsibility—Perspectives in Indian Context*, 1 AUSTL. J. BUS. & ECON. STUD. 93, 93 (2015).

97. *See* Loi 2001-420 du 15 mai 2001 relative aux nouvelles régulations économiques [Law 2001-420 of May 15, 2001 relative to the New Economic Regulations], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], May 16, 2001, p. 7776, art. 116.

98. The previous regime applied only to 700 French listed companies. Amel Ben Rhouma, Claude Francoeur & Guillaume Robin, *International Corporate Sustainability Barometer 2012: Sustainability Management in France*, *in* CORPORATE SUSTAINABILITY IN INTERNATIONAL COMPARISON: STATE OF PRACTICE, OPPORTUNITIES AND CHALLENGES 69, 70 (Stefan Schaltegger et al. eds., 2014).

99. Décret 2012–557 du 24 avril 2012 relatif aux obligations de transparence des entreprises en matière sociale et environnementale [Decree 2012–557 of April 24, 2012 relative to the obligations of transparency of companies in social and environmental matters], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Apr. 26, 2012, No. 18.

regulatory void.[100] For this reason, Grenelle II can still be seen as an intermediate type between facilitation and substitution.

The process that has taken place in India and France seems to represent a general evolutionary pattern. Until the early 2010s, public law has, in most countries, abstained from requiring non-financial disclosure.[101] As CSR has become more influential, several countries have incorporated general SR requirements into their formal legal structures without, however, intervening in the specifics of the disclosure formats. Finally, in several countries, parts of the voluntary PTR CSR regime have been substituted by mandatory public regulation.[102] The foregoing discussion demonstrates that the regulatory field of SR has evolved from a field governed primarily by private regulation into a complex hybrid regime, involving both private and public elements. The GRI has played two roles in this process. First, it was influential in causing governments to incorporate SR in their formal regulatory schemes. Second, because most of the current regulatory structures do not include detailed requirements regarding the content of disclosure, the GRI functions as a global benchmark to which governments and firms turn for guidance.[103] The normative impact of GRI is not captured by the number of GRI-based voluntary reports published annually but is also reflected in its influence on the

100. Institut RSE Mgmt., The Grenelle II Act in France: A Milestone Towards Integrated Reporting 7 (2012).

101. Since 2012 and onward, Denmark, South Africa, China, Malaysia, Brazil, Hong Kong, and India have been the first countries to generally mandate SR whereas Finland and Sweden mandated SR but only for state-owned corporations. *See* Ioannis Ioannou & George Serafeim, *The Consequences of Mandatory Corporate Sustainability Reporting* 8 (Harvard Bus. Sch., Working Paper No. 11-100, 2017).

102. *See* Sarfati, *supra* note 82. See also UNITED NATIONS ENVIRONMENT PROGRAMME ET AL., *supra* note 85, at 14, which asserts that while there has been growth in mandatory requirements for reporting, the distinction between voluntary and mandatory requirements is dimming due to the overlap between approaches when mandatory requirements are supported by voluntary guidelines, or when using "report or explain." Others have asserted that while CSR originated "as a neo-liberal concept that helped to downscale government regulations, . . . it has . . . matured into a more progressive approach of societal co-regulation in recent years." *See* Rienhard Steurer, *The Role of Governments in Corporate Social Responsibility: Characterising Public Policies on CSR in Europe*, 43 POL'Y SCI. 49, 49 (2010).

103. GRI has been said to present a reporting framework that would "unburden existing Indian reporters from the difficulties of using multiple frameworks." GLOBAL REPORTING INITIATIVE, *Guidance on Alignment of the GRI G3.1 Guidelines, NVGs and BRR* 6 (2013), https://www.globalreporting.org/resourcelibrary/Guidance-on-Alignment-of-the-GRI-Guidelines.pdf; *see generally* Sureet Singh, *Compulsory CSR in India; Understanding Clause 135*, 5 INT'L RES. J. MGMT. SOC. & HUMAN (2014) (explaining India's Companies Act 2013, which mandates corporate spending on social welfare).

structure of public regulation and the suitability reports produced in accordance with this regulation.

The role of the GRI as a global benchmark was also reflected in global instruments which intervened in the SR field. The pattern of intervention adopted the facilitation track by setting out general guidelines but leaving out the details. Thus, for example, important general CSR instruments, such as the UN Global Compact, the OECD's Guidelines for Multinational Enterprises, and the CERES Principles[104] include general guidelines on environmental-social disclosure but do not seek to develop detailed reporting formats.[105] The reluctance of major global CSR bodies to develop competing reporting schemes, and the structuring of these regimes as meta-regulators, has supported the transformation of the GRI into the focal point for the transnational SR regime.[106]

The central role of the GRI was also reflected in processes that took place at the international level. First, the GRI has developed a web of partnerships with leading global organizations such as the OECD, the Global Compact, UNEP, ISO, the Carbon Disclosure Project (CDP), the Earth Charter Initiative, the International Finance Cooperation (IFC),

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104. *See* UN GLOBAL COMPACT, *UN Global Compact Policy on Communicating Progress*, at 1 (Mar. 1, 2013), https://www.unglobalcompact.org/docs/communication_on_progress /COP_Policy.pdf; Organisation for Economic Co-operation and Development [OECD], *OECD Guidelines for Multinational Enterprises*, pt. III, no. 33, at 29 (2011) ("The *Guidelines* also encourage a second set of disclosure or communication practices in areas where reporting standards are still evolving such as, for example, social, environmental and risk reporting."); *The Ceres Principles*, CERES, Princ. 8, https://www.ceres.org/about-us/our-history/ceres-principles ("We will inform in a timely manner everyone who may be affected by conditions caused by our company that might endanger health, safety or the environment.").

105. The 2012 United Nations Conference on Sustainable Development (Rio+20), also includes general comments on the importance of advancing SR by corporations. G.A. Res. 66/288, ¶ 47 (July 27, 2012) ("We acknowledge the importance of corporate sustainability reporting, and encourage companies, where appropriate, especially publicly listed and large companies, to consider integrating sustainability information into their reporting cycle. We encourage industry, interested governments and relevant stakeholders, with the support of the United Nations system, as appropriate, to develop models for best practice and facilitate action for the integration of sustainability reporting, taking into account experiences from already existing frameworks and paying particular attention to the needs of developing countries, including for capacity-building.").

106. *See* Sabine Einwiller, Christopher Ruppel & Alexandra Schnauber, Harmonization and Differences in CSR Reporting of US and German Companies: Analyzing the Role of Global Reporting Standards and Country-of-Origin, 21 CORP. COMM.: AN INT'L J. 230, 231 (2016). *See generally* Iris H-Y Chiu, *Standardization in Corporate Social Responsibility Reporting and a Universalist Concept of CSR?—A Path Paved with Good Intentions*, 22 FLA. J. INT'L L. 361 (2010) (addressing the unintended consequences that come with convergence and standardization of CSR reporting).

and UNCTAD.[107] These partnerships have contributed to the legitimacy of the GRI and have provided assurance that it is not captured by business interests. This assurance made it possible for governments to defer to GRI (even if only implicitly) in determining the specific details of the sustainability reporting.

IV. THE INTERACTIONS BETWEEN PRIVATE AND PUBLIC REGULATION IN SUSTAINABLE FOREST CERTIFICATION

A. The Growth in Private Transnational Sustainable Forest Certification Schemes

While traditionally governments have controlled the management of forests and forest services, private entities have gained, through PTR and its interaction with public regulation, a growing role in the management of forests.[108] Forest certification, the foremost voluntary private regulatory mechanism in sustainable forest management (SFM), was first introduced in the early 1990s to address concerns of deforestation and forest degradation and to promote the SFM and biodiversity.[109] The market of standardization and certification schemes consists of both civic-society-led and industry-led schemes, creating an array of private transnational and national certification organizations and codes.[110] Voluntary forest certification schemes are often used to meet specific customer requirements for timber products.[111] Typically, these include standards that apply to management practices within forest management units and to the chain of custody of the timber products.[112]

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107. *GRI's Alliances and Synergies*, GRI, https://www.globalreporting.org/information/about-gri/alliances-and-synergies/Pages/default.aspx (last visited Nov. 5, 2017). *See* Kenneth W. Abbott, *Engaging the Public and the Private in Global Sustainability Governance,* 88 INT'L AFF. 543, 562–63 (2012).

108. *See generally* FOOD AND AGRICULTURE ORGANIZATION [FAO], *State of the World's Forests: Enhancing the Socioeconomic Benefits from Forests* (2014) [hereinafter FAO, 2014] (analyzing forests and the benefits of well-management).

109. Ewald Rametsteiner & Markku Simula, *Forest Certification—An Instrument to Promote Sustainable Forest Management?*, 67 J. ENVTL. MGMT. 87, 87 (2003).

110. CASHORE ET AL., *supra* note 4, at 12–13; Christine Overdevest, *Comparing Forest Certification Schemes: The Case of Ratcheting Standards in the Forest Sector,* 8 SOCIO-ECON. REV. 47 (2010).

111. *See* Lars H. Gulbrandsen, *Overlapping Public and Private Governance: Can Forest Certification Fill the Gaps in the Global Forest Regime?*, 4 GLOBAL ENVTL. POL. 75, 93 (2004).

112. *See* Graeme Auld et al., *Certification Schemes and the Impacts on Forests and Forestry*, 33 ANN. REV. ENV'T & RESOURCES. 187, 190 (2008).

The Forest Stewardship Council (FSC) was the first PTR scheme to introduce sustainable forest certification. FSC has developed a set of forest management principles and criteria, often accompanied by country or region-specific indicators. The FSC chain of custody standard regulates the supply chain from the source of supply of raw wood material to products to then the end consumer.[113] Another established forest certification system is the Program for the Endorsement of Forest Certification (PEFC). PEFC is an umbrella organization for the assessment and mutual recognition of national SFM certification schemes. Corresponding to FSC, two types of certificates are available: PEFC-FM and PEFC-COC. PEFC-FM consists of sustainability criteria for forest maintenance and wood harvesting in the forest itself, whereas PEFC-COC is related to the downstream supply of wood products.[114]

Forest certification schemes have become widely used market instruments in the governance of the forest sector.[115] The area of FSC and PEFC certified forest has increased from fifty-three million hectares in 2000 to 407 million hectares in 2012,[116] amounting to almost 10 percent of total global forest-covered lands.[117] Also, the proportion of global round wood supply from certified forests is estimated at 28.3 percent (i.e., 501 million cubic meters).[118] Much of this growth has been fueled by the supply-chain demand and especially the demand by consumers for sustainable wood products. Yet, it is also through the facilitation and incorporation in public law and policy that these private SFM certifications have gained salience and broadened their market coverage.

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113. *See id.* at 198.

114. *See* Richard Sikkema et al., *Legal Harvesting, Sustainable Sourcing and Cascaded Use of Wood for Bioenergy: Their Coverage Through Existing Certification Frameworks for Sustainable Forest Management*, 5 FORESTS 2163, 2167 (2014); PETER FEILBERG ET AL., NEPCON, COMPARATIVE ANALYSIS OF THE PEFC SYSTEM WITH FSC CONTROLLED WOOD REQUIREMENTS, at 8, 18 (2012).

115. Sikkema et.al, *supra* note 114.

116. *Area of Forest under Sustainable Management: Total FSC and PEFC Forest Management Certification*, BIODIVERSITY INDICATORS PARTNERSHIP, http://www.bipindicators.net/forestcertification (last updated 2016).

117. *See generally* FOOD AND AGRICULTURE ORGANIZATION [FAO], *Forest Resources Assessment 2010: Global Tables* (2010), http://www.fao.org/forestry/fra/fra2010/en/ (presenting that forest-covered lands amounted to 4,032 million hectares in 2014).

118. *See* UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE [UNECE] & FOOD AND AGRICULTURE ORGANIZATION [FAO], *Forest Products Annual Market Review 2012–2013*, at 20 tbl.2.4.1 (2013), https://www.unece.org/fileadmin/DAM/timber/publications/FPAMR2013. pdf.

B. The Interactions Between Sustainable Forest Certification Schemes and Public National and International Regulation

The literature shows that governments have facilitated the implementation of PEFC or FSC certification protocols in many jurisdictions.[119] Yet, not enough attention was given to the ways in which public law interacts with these PTR schemes. There are several potential areas of interaction between government regulation and private forest certification. Governments own, manage, and sell woodlands and wood products. As forest owners, managers, and retailers, they are candidates for the adoption of sustainable forest certification.[120] Governments are also large procurers of wood products for infrastructure and operational use.[121] Finally, governments are central guardians of the public interest in the sustainable management of forests, the curtailing of illegal logging, and the exploitation of forests. In these three capacities, governmental policies and regulations have played key roles in the expansion or containment of PTR SFM schemes.

In certain cases, governments have helped to promote certification through the facilitation of PTR both legally and by providing monetary incentives.[122] "For example, Nicaragua's national forest policy promotes certification for SFM purposes.[123] Canadian provincial governments provide funding to help companies attain chain of custody

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119. *See* Magnus Boström, *How State-Dependent is a Non-State-Driven Rule-Making Project? The Case of Forest Certification in Sweden*, 5 J. ENVTL. POL'Y & PLAN. 165, 165 (2003); FRED GALE & MARCUS HAWARD, GLOBAL COMMODITY GOVERNANCE: STATE RESPONSES TO SUSTAINABLE FOREST AND FISHERIES CERTIFICATION 48–70 (2011); JANE LISTER, CORPORATE SOCIAL RESPONSIBILITY AND THE STATE: INTERNATIONAL APPROACHES TO FOREST CO-REGULATION 129 (2011); CHRIS TOLLEFSON, FRED GALE & DAVID HALEY, SETTING THE STANDARD: CERTIFICATION, GOVERNANCE, AND THE FOREST STEWARDSHIP COUNCIL 17–18 (2008).

120. Governments can, and often do, act as clients for non-state programs through the certification of state-controlled or owned operations. *See* LARS H. GULBRANDSEN, TRANSNATIONAL ENVIRONMENTAL GOVERNANCE: THE EMERGENCE AND EFFECTS OF THE CERTIFICATION OF FORESTS AND FISHERIES 79–82 (2010); Auld et al., *supra* note 112, at 190.

121. *See* Gulbrandsen, *supra* note 10, at 80, which focuses on government procurement policies for wood. Gulbrandsen finds that governmental procurement policies in those "countries with timber procurement specifications consider FSC and PEFC certificates to be evidence of the legality and sustainability of forest products." It should be noted that the paper focuses on government procurement policies rather than legality requirements set according to regulation on private market traders.

122. *See id.*; G. Cornelis van Kooten, Harry W. Nelson & Ilan Vertinsky, *Certification of Sustainable Forest Management Practices: A Global Perspective on Why Countries Certify*, 7 FOREST POL'Y & ECON. 857 (2005).

123. *See* FAO, 2014, *supra* note 108, at 63.

certification.[124] Honduras's National Forest Policy includes a sub-program for Economic Development in Forestry[,][125] which aims to promote certification processes."[126]

Governments have increasingly adopted private certification for state-owned forests, and thus have increased the incorporation of private certification in public policy and management.[127] For instance, twelve U.S. states have adopted PTR certification schemes to audit forestry practices on state-owned lands.[128] Bolivia, Guatemala, Latvia, and Poland also implement PTR SFM certification schemes on public lands.[129] As of 2013, there are sixty-one countries that have public forests certified by the FSC and around thirty countries with public forests certified by PEFC, mostly in Europe and North America.[130]

Governments have also *facilitated or incorporated* private certification through public procurement policies or laws.[131] This has been yet another step in the incorporation of private mechanisms into public law. For example, the UK, Netherlands, Danish, Bolivian, Guatemalan, Latvian, and Polish governments have accepted private certificates as evidence of legality and sustainability when purchasing timber products.[132]

While PTR SFM schemes have enjoyed significant growth during the 2000s, a process of development of government-led SFM schemes has occurred in parallel. Such governmental-led regional initiatives,

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124. *Id.*
125. *Id.*
126. *Id.*
127. *See* Falkner, *supra* at note 45.
128. *See* JANE LISTER, THE CERTIFICATION OF U.S. STATE-OWNED FORESTLAND, at ii (UBC, Vancouver, Institute for Resources, Environment & Sustainability, Canada, 2007).
129. *See* Benjamin Cashore et al., Confronting Sustainability: Forest Certification in Developing and Transitioning Countries 21 (Report No. 8, New Haven, CT, Yale Forest & Environmental Studies, 2006).
130. FAO, 2014, *supra* note 108, at 63.
131. *See, e.g.*, Gulbrandsen, *supra* note 10, (focusing on government procurement policies for wood. Gulbrandsen finds that governmental procurements policies in those countries with timber procurement specifications consider FSC and PEFC certificates to be evidence of the legality and sustainability of forest products. It should be noted that the paper focuses on government procurement policies rather than legality requirements set according to regulation on private market traders).
132. *See* Cashore et al., *supra* note 129. By end-2010, a total of fourteen countries worldwide had operational public-sector procurement policies at the central government level for sourcing sustainable and certified wood and wood-based products (Austria, Belgium, Denmark, Finland, France, Germany, Japan, Mexico, Netherlands, New Zealand, Norway, Switzerland, United Kingdom). By the end of 2013, an additional six countries had put in place procurement policies or laws that promoted sustainable certification systems as criteria for wood sourcing (these included Australia, China, India, Italy, Republic of Korea, and Slovenia). *See* FAO, 2014, *supra* note 108, at 64.

including the Montreal Process of non-European temperate forested countries; the Ministerial Conference on the Protection of Forests in Europe (MCPFE); the Central American Initiative; the Amazonian (Tarapoto) process in South America; the Dry-Zone Africa; and the process for the tropical region under the auspices of the International Tropical Timber Organization, have advanced SFM criteria and indicators.[133] While these processes attracted the participation of over 150 countries, and developed SFM criteria and indicators, they could *not substitute* PTR SFM schemes as they did not include prescriptive standards or targets for performance.[134]

While in many cases countries have incorporated and facilitated PTR SFM schemes through public regulations and policies, public law has, in some cases, *suppressed* the expansion of voluntary certification. This they have done by avoiding explicit recognition of voluntary certification schemes or by providing that certification is an additional but not sufficient assurance of compliance with statutory requirements. This has occurred in the case of the regulatory requirements regarding the trade in illegal wood. Recently, Europe has, alongside the United States and Australia, adopted regulations banning the import of illegally harvested timber. In the EU, the European Timber Regulation (EUTR),[135] which came into force in 2013, aimed to prevent illegal logging of forests worldwide. This is to be achieved through the prevention of sales of illegal timber and timber products on the EU internal market.[136] In the United States, the Food, Conservation and Energy Act of 2008 expanded its protection to a broader range of plants and plant products and made it illegal to trade in or import to the United States plants that had been harvested contrary to any applicable U.S. federal, state, or Indian tribal law or foreign law.[137] In similar fashion, Australia adopted the Illegal Logging Prohibition Act 2012[138] and the Illegal Logging Prohibition Regulation 2012 (the Regulation)[139]

133. *See* G. M. Hickey, *Regulatory Approaches to Monitoring Sustainable Forest Management*, 6 INT'L FORESTRY REV. 89, 90 (2004).

134. *See* Gulbrandsen, *supra* note 111, at 80–81.

135. Regulation 995/2010, of the European Parliament and of the Council of 20 October 2010 Laying Down Obligations of Operators who Place Timber and Timber Products on the Market, 2010 O.J. (L 295) 23 [hereinafter EU Timber Regulation].

136. *See* Sikkema et al., *supra* note 114, at 2173.

137. The Food, Conservation and Energy Act 2008, Pub. L. No. 110–234, § 8204, 122 Stat. 1291 (describing the prevention of illegal logging practices).

138. *Illegal Logging Prohibition Act 2012* (Cth) (Austl.), https://www.legislation.gov.au/Details/C2015C00427/Download (last visited Apr. 4, 2018).

139. *Illegal Logging Prohibition Regulation 2012* (Cth) (Austl.), https://www.legislation.gov.au/Details/F2014C01294/Download (last visited Apr. 4, 2018).

to criminalize the illegal import of wood or the production of wood products that originate from illegal wood.

The EUTR prohibits placing on the EU market illegally harvested timber that is in violation of the laws of the country of harvest.[140] EUTR requires EU operators who place timber or timber products on the EU market for the first time to ensure products have been legally produced.[141] To this end, they are required to exercise due diligence as part of a risk-assessment process aimed at minimizing the risk of illegally harvested timber entering the supply chain.[142] Operators are exempted from the due diligence process if they are trading in timber accompanied by FLEGT (Forest Law Enforcement, Governance and Trade)[143] or CITES (Convention on International Trade in Endangered Species)[144] licenses.[145] These international public certifications are automatically recognized as legal. At the same time, PTR certifications, such as FSC or PEFC, are not accepted (automatically) as certificates of legality. The recent EU guidance document for the regulation is cautious in its assessment of the validity of these and other PTR certifications. It places the onus on operators to assess the credibility of private certifications. While it allows the submission of the PTR certification as evidence in the legality assessment of the due diligence process, there is no presumption that legality is assured by the

140. EU Timber Regulation, *supra* note 135, art. (7) of preamble.

141. *Id.* art. 4(1).

142. *Id.* art. 4(2); *see also* Akiva Fishman & Krystof Obidzinski, *European Union Timber Regulation: Is It Legal?*, 23 REV. EUR. COMMUNITY. & INT'L ENVTL. L. 258, 262 (2014).

143. FLEGT was inaugurated by the EU in 2003 to combat illegal logging and promote sustainable forest governance by negotiating Voluntary Partnership Agreements with developing countries. *See* Christine Overdevest & Jonathan Zeitlin, *Forest Law Enforcement and Trade (FLEGT): Transnational Dynamics of EU Experimentalist Regime*, *in* EXTENDING EXPERIMENTALIST GOVERNANCE?: THE EUROPEAN UNION AND TRANSNATIONAL REGULATION 137 (Jonathan Zeitlin ed., 2015).

144. Convention on International Trade in Endangered Species of Wild Fauna and Flora, International Union for Conservation of Nature, Mar. 3, 1973, 993 U.N.T.S. 243 (CITES) is an international treaty that entered into force in 1975 and is signed today by 181 parties (countries and the EU). The Treaty text is available online at: https://cites.org/sites/default/files/eng/disc/CITES-Convention-EN.pdf. CITES works by subjecting international trade in specimens of selected species to certain controls. All import, export, re-export and introduction from the sea of species covered by the Convention have to be authorized through a licensing system. Each Party to the Convention must designate one or more Management Authorities in charge of administering that licensing system. The exemption, and presumption of legality of FLEGT and CITES licensed timber is stated in article 3 of the EU Timber Regulation, *supra* note 135.

145. *See* EU Timber Regulation, *supra* note 135, art. 3.

certification.[146] This framework can be contrasted with the Australian Illegal Logging Prohibition Act 2012, which acknowledges FSC and PEFC as "Timber Legality Frameworks" according to which risk assessment of legality can be performed.[147] By so doing, it has in effect incorporated these PTRs into public law.

The outcome of the foregoing EUTR is to strengthen public international certifications at the expense of private ones. By refraining from providing PTR certification with a presumption of legality, the EUTR (unlike the Australian regime) undercuts the incentives of wood traders to invest the resources required to obtain a PEFC or FSC certification. While there may still be an economic or business case for such investment, the introduction of public certification suppresses the potential growth of PTR schemes. At the same time, in other areas of SFM (i.e., governmental managed forests and public procurement policies), it seems that legal requirements and governmental policies have facilitated, if not incorporated, PTR schemes.

CONCLUSION

The growth of environmental PTR has created a hybrid governance structure in which public and private instruments interact in a much more extensive and complex way than two decades ago. These interactions range from incorporation to suppression (with various intermediate interactions). In some areas, such as SFM and SR, public law has entered areas previously governed by private regulation. In other areas, such as renewable energy and GHG emissions, public national and international regulatory schemes seem keen to rely on private standards and certifications.

The cases of SR and SFM certification provide fertile ground for the assessment of the interaction of PTR with public, national, and international law.[148] While the case of sustainability reporting illustrates how public law builds on the expertise developed by private organizations (such as GRI) even as it incorporates more reporting obligations into public law, the case of SFM regulation is

146. *European Commission, Guidance Document for the EU Timber Regulation*, COM (2016) 755 final (Feb. 2, 2016). See § 6, The Role of Third-Party-Verification Schemes in Risk Assessment and Risk Mitigation: "When operators rely on certification as assurance and purchase from suppliers with chain-of-custody certification, they must check that the chain of custody certification covers the specific product they are purchasing."

147. *See Illegal Logging Prohibition Regulation 2012*, *supra* note 139, at 31 ("Timber legality frameworks, country specific guidelines and State specific guidelines.").

148. *See* Eberlein et al., *supra* note 7; Gulbrandsen, *supra* note 10; David Vogel, *The Private Regulation of Global Corporate Conduct: Achievements and Limitations*, 49 BUS. SOC. 68 (2010).

somewhat more mixed, reflecting a tendency for increased state intervention and leading to the partial suppression of PTR SFM. While public regulation of SR has expanded, public law has left a significant role for the GRI by refraining from developing detailed guidelines regarding the content of non-financial disclosure. The web of partnerships that the GRI has established with various international organizations, such as UNEP and the Global Compact, has contributed to its legitimacy and has also positioned it as the global benchmark for SR. In contrast, in the case of SFM, the increased involvement of states may undermine the further expansion of PTR.

The increased influence of private regulation has created both challenges and opportunities. PTR offers the advantage of better access to market information; capacity for democratic innovation (especially at the global level); better adaptive capacity; and lower costs to regime building. However, PTR is also associated with certain costs such as higher probability of regulatory capture, legitimacy problems, and weak enforcement mechanisms. We highlighted above various mechanisms that can mitigate some of the difficulties associated with PTR. Meta-regulatory techniques can give public authorities some control over private schemes and the ability to guide their operation. Collaboration between public and private bodies can strengthen the legitimacy of PTRs and possibly reduce regulatory capture. Finally, the ensemble structure of PTR regimes creates positive enforcement and normative externalities that may further strengthen, in a snowball effect, the presence and standing of PTR in global environmental governance.

The foregoing analysis suggests that it is a mistake to view private forms of regulation as mere cheap talk. However, we must be realistic about the capacity of private regulation (e.g., CSR codes) to trigger radical pro-sustainability changes. Private regulation remains constrained by the precepts of modern capitalism and by the broad institutional framework in which both corporations and private bodies (e.g., CSR institutions) are situated.[149] These constraints emphasize the regulatory value of hybrid regimes in which public regulatory institutions actively participate in the governance of the regime.

149. Perez, *The Green Economy Paradox*, *supra* note 48, at 179.